SHORUBBER (M) SDN BHD v. CIMB BANK BHD

HIGH COURT MALAYA, PULAU PINANG
VARGHESE GEORGE J
[CIVIL SUIT NO: D-22NCVC-675-10-2011]
6 OCTOBER 2015

BANKING: *Banker and customer – Duty of banker – Forgery – Honouring of forged cheques – Failure of bank to detect discrepancy of signature on forged cheques – Monies debited from customer's bank account – Recovery of monies debited – Whether bank wrongly debited monies from customer's account – Bills of Exchange Act 1949, ss. 24 & 73A – Civil Law Act 1956, s. 12*

BANKING: *Cheques – Forgery – Bank honouring forged cheques – Failure of bank to detect discrepancy of signature on forged cheques – Monies debited from customer's bank account – Recovery of monies debited – Whether bank wrongly debited monies from customer's account – Whether customer knowingly or negligently contributed to forgery – Whether cheques honoured in good faith – Bills of Exchange Act 1949, ss. 24 & 73A*

TORT: *Negligence – Contributory negligence – Banker and customer – Duty of customer – Forged cheque, honouring of – Monies debited from customer's bank account – Recovery of monies debited – Whether bank wrongly debited monies from customer's account – Failure to notify bank of non-receipt of monthly statements – Whether customer knowingly or negligently contributed to forgery*

The plaintiff was a customer of the defendant, a commercial bank. The plaintiff averred that between 2004 and 2009, the defendant had paid out 173 cheques ('the cheques') purported to be drawn by the plaintiff and had debited the plaintiff's current account with the defendant in the sum of RM33,338,639.27 ('the sum'). According to the plaintiff, it did not draw the said cheques or authorise the drawing thereof, and that the signature on those cheques was not of any one of the plaintiff's authorised signatories and was forged. It was suspected that the cheques were forged by the plaintiff's employee. In denying the plaintiff's claim, the defendant submitted that the signatures were not forged as there were several other cheques cleared between 2004 and 2009 which had similar, if not identical, signatures to the alleged forged signatures on the signatory on the cheques. In furtherance to that, the defendant had provided monthly statements of accounts to the plaintiff and the plaintiff did not notify the defendant that the plaintiff had not received such monthly statements nor that the information or balances shown were in error for unauthorised debit. The defendant relied on s. 73A of the Bills of Exchange Act 1949 ('BEA') and maintained that the cheques were paid in good faith and the plaintiff had knowingly or negligently contributed to the alleged forgeries by failing to supervise its own staff to ensure that cheque books were kept in safe custody to undertake proper and regular reconciliation. In this action, the plaintiff sought to recover monies that had been debited from the plaintiff's account as a result of the defendant

honouring and paying out on allegedly forged cheques presented for clearance. The issues that arose for the court's determination were: (i) whether on a balance of probability, the signatures on the cheques were forged; (ii) whether the forged cheques gave rise to an estoppel under s. 24 of the BEA or in law; (iii) whether the defendant was entitled to protection under s. 73A of the BEA; and (iv) whether the plaintiff was liable to share in the responsibility for the loss pursuant to s. 12 of the Civil Law Act 1956 ('CLA').

Held (allowing claim):

(1) The disputed signatures on the cheques were forged. Payments released by the defendant on the cheques were in breach of the mandate or authority given by the plaintiff to the defendant in relation to the operations of the plaintiff's current account maintained by the defendant. Section 24 of the BEA provides that the forged signature renders the cheques in question to be wholly-inoperative as against the bank. If a bank pays a cheque bearing a customer's forged signature, the bank had no authority to pay and was not entitled to debit the customer's account unless the customer, like the plaintiff here, was estopped or precluded from placing reliance on the forgery or want of authority by the customer's own representation, as recognised by equity (paras 10 & 25)

(2) No estoppel arose by clear and direct representation communicated by the plaintiff to the defendant. The liability of a banker in common law is founded on conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on the customer's account is absolutely liable to make good the loss. The forged instrument is a nullity and the banker has no authority, actual or implied from his customer to act on it. Section 24 of the BEA, which codified the common law creates only a limited exception in favour of the banker, where by recourse to the doctrine of estoppel, a customer is precluded from recovering his loss if the customer had represented to his banker that the cheque bearing the forged signature was nevertheless effective and good for payment. (paras 26 & 30)

(3) The introduction of s. 73A into the BEA was not intended to absolve a bank of its primary responsibilities and obligations to its customer that was provided for in the other provisions of the BEA. There was no evidence whatsoever before the court to hold that PW4 (as one of the designated signatories) had personally, knowingly or negligently contributed to the forgeries. The fact that there had been 173 forged cheques drawn up and cashed out over a span of some five years which had gone undetected did not *ipso facto* or by necessary implications mean that the plaintiff had knowingly or negligently contributed to the forgeries. On the other hand, the defendant had failed to show that the

payment made on the cheques had been made in good faith. Therefore, the defendant was not entitled to the absolute defence under s. 73A of the BEA. (paras 49, 53 & 69)

(4) It was not open to the court to consider any relief under s. 12 of the CLA under the head contributory negligence since the defences under ss. 24 and 73A of the BEA made available to the defendant were specific and absolute in the context of the payments made by a bank on forged cheques. (para 70)

(5) The defendant was not entitled to debit the plaintiff's account for the cheques. The defendant ought to repay the sum of RM30,004,775.27 with costs and interest to the plaintiff. (para 3)

Case(s) referred to:

Affin Bank Bhd v. Successcom Enterprise Sdn Bhd [2009] 4 CLJ 764 CA ***(refd)***
Australian Guarantee Corporation Ltd v. Commissioner of the State Bank of Victoria [1989] VR 61 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Brown v. Westminter Bank Ltd [1964] 2 Lloyds' 187 ***(refd)***
CIMB Bank Bhd v. Panaron Control Sdn Bhd [2015] 1 CLJ 1056 CA ***(refd)***
Day v. Bank of New South Wales 19 ALR 32 ***(refd)***
F Vesta v. Butcher & Ors [1986] 2 All ER 488 ***(refd)***
Helson v. McKenzies (Cuba Street) Ltd [1950] NZLR 878 ***(refd)***
Leolaris (M) Sdn Bhd v. RHB Bank Bhd [2009] 10 CLJ 248 HC ***(refd)***
Lumsden & Co v. London Trustee & Savings Bank [1971] 1 Lloyd's Rep 114 ***(refd)***
Malaysia Plastics Sdn Bhd v. United Overseas Bank (M) [2012] 4 CLJ 997 HC ***(refd)***
Natsafe Engineering Sdn Bhd v. CIMB Bank Bhd [2014] 4 CLJ 510 HC ***(refd)***
Prima Nova Sdn Bhd v. Affin Bank Bhd [2014] 9 CLJ 442 CA ***(refd)***
Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378 ***(refd)***
Starglade Properties Ltd v. Nash, [2010] All ER(D) 221 ***(refd)***
Syarikat Perkapalan Timor v. United Malayan Banking Corporation Bhd [1981] 1 LNS 125 ***(refd)***
Tina Motor Pty Ltd v. Australia & New Zealand Banking Group Ltd [1977] VR 205 ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***
Wilton v. Commonwealth Trading Bank of Australia [1973] 2 NSWLR 644 ***(refd)***
Zanda Investment Ltd v. Bank of America National Trust & Savings Association & Ors [1994] 2 HKC 409 ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A
Civil Law Act 1956, s. 12(1), (6)
Evidence Act 1950, ss. 73(1), 101
Rules of the High Court 1980, O. 14

Banking Act 2009 [UK], s. 47

Other source(s) referred to:
Poh Chu Chai, *Banking Law*, 2nd edn, p 241

For the plaintiff - Ambiga Sreenevasan (Shireen Selvaratnam & James Au Wei-Wern with him); M/s Sreenevasan
For the defendant - Andrew Chew (JS Hoi with him); M/s Lee Hishamudin, Allen & Gledhill
For the KPMG - Dylan Chiam; M/s Mah-Kamariyah & Philip Koh

(Civil Suit No: 22-77-2010)
For the plaintiff - Sarvinderjit Singh; M/s Joginder Singh & Co
For the defendant - V Amareson; M/s Amareson & Meera

Reported by Najib Tamby

JUDGMENT

Varghese George J:

Introduction

[1] The plaintiff was a customer of the defendant, a commercial bank (the defendant-bank). The plaintiff by this action in essence sought to recover monies that had been debited from the plaintiff's account as a result of the defendant-bank honouring and paying out on allegedly forged cheques presented for clearance.

[2] The trial which commenced on 22 November 2012 stretched over some 17 days. Seven witnesses testified for the plaintiff while the defendant-bank called 21 witnesses.

[3] On 19 December 2014, I allowed the plaintiff's claim and made the following orders:

(a) The defendant-bank was not entitled to debit the plaintiff account for the 173 cheques as listed in the first schedule to the re-amended statement of claim amounting to a sum of RM33,338,639.27;

(b) Payment of the sum of RM30,004,775.27 as the amount owing and payable by the defendant-bank to the plaintiff;

(c) Interest on the sum of RM30,004,775.27 at the rate of RM2.5% p.a. from the date of the writ until judgment;

(d) Interest on the sum of RM30,004,775.27 at the rate of 5% p.a. from the date of judgment until full realisation; and

(e) Costs of RM150,000 to be paid by the defendant-bank to the plaintiff.

[4] I now set out the full grounds for my decision.

Pleadings

[5] In the re-amended statement of claim the plaintiff avers that:

(a) between the period 14 September 2004 to 1 April 2009 the defendant-bank had paid out 173 cheques purported to be drawn by the plaintiff and had debited the plaintiff's current account with the defendant-bank in the total sum of RM33,338,639.27.

(b) the plaintiff did not draw the said cheques or authorise the drawing thereof, in that the signature on each of those cheques was not of any one of the plaintiff's authorised signatories and was forged.

(c) the plaintiff believes or suspects that the disputed signatures were forged by one Chen Siew Keng (Chen), who was at the material time keeping and maintaining the plaintiff's accounts.

(d) the plaintiff's had since recovered from a third party a sum of RM3,333,864 thereby reducing the plaintiff's loss, the subject of the claim against the defendant-bank, to RM30,004,775.27.

[6] The defendant-bank in their re-amended defence deny the plaintiff was entitled to the relief sought or any part of it. The defendant-bank also stated that:

(a) the plaintiff's current account with the defendant-bank was governed by the defendant-bank's terms and conditions for operations of current account.

(b) the defendant-bank had provided monthly statements of accounts to plaintiff and the plaintiff did not notify the defendant-bank that the plaintiff had not received such monthly statements nor that the information or balances shown were in error for unauthorised debits and, unless there was such notice within 14 days of the date of such monthly statement, the balances shown were to be deemed correct.

(c) the signatures on the 173 cheques were not forged and during the period 2004 and 2009 there were several other cheques cleared which had similar, if not identical, signatures to the alleged forged signatures of the signatory on the 173 cheques.

(d) The defendant-bank had in respect of the 173 cheques acted in accordance with the plaintiff's mandate without any complaint for a period of almost five years and with respect the cheques for RM25,000 and above, the defendant-bank had in accordance with usual practice obtained confirmation of plaintiff's authorised officers prior to making payment on those cheques.

(e) the plaintiff was solely responsible for the acts or omissions of its own employee, Chen.

(f) further or in the alternative, that the defendant-bank relied on s. 73A of the Bills of Exchange Act 1949 (BEA) and maintained that:

(i) the 173 cheques were paid out in good faith in the ordinary course of business over the five year period;

(ii) the plaintiff and/or the persons whose signatures they purport to be, knowingly or negligently contributed to the alleged forgeries. (Particulars as to the negligence and plaintiff's failure to supervise its own staff, to ensure that cheque books were kept in a safe custody, to undertake proper and regular reconciliation etc. were also pleaded).

(g) Further alternatively, the plaintiff was on the facts liable for contributory negligence in respect of the alleged losses suffered by the plaintiff.

Civil Suit No. 22-77-2010

[7] This Suit 22-77-2010 had been separately instituted by the plaintiff against Chen (Chen Suit). By an agreement dated 19 January 2012 (B1) and submitted to court, the parties in the respective suits, namely, in the instant suit and in the Chen Suit, registered the following positions:

(a) That the decision of this court on the issue of whether the signatures on the 173 cheques (or any part thereof) are forged, to be determined in the instant suit and will be binding on the parties in the Chen Suit (binding issue).

(b) That counsel in the Chen Suit, with the leave of court, will be at liberty to cross examine the witnesses in the instant suit in respect of the binding Issue only.

(c) This agreement is made without admission of any liability on the part of the defendant in the Chen Suit.

Statement Of Agreed Facts

[8] Before commencement of trial, a statement (SAF) setting out the following agreed facts was filed with the court.

(a) The plaintiff is a company incorporated under the laws of Malaysia with its registered address at Suite E-13-10, Block E, Plaza Mont' Kiara, No. 2, Jalan Kiara, Mont' Kiara, 50480 Kuala Lumpur.

(i) The plaintiff's principal place of business is at No. 2, Jalan Industri Ringan 6, Jejawi Industrial Estate, 02600 Arau, Perlis.

(ii) The plaintiff's principal activities are manufacturing and sale of Natural Rubber, Polyurethane, PVC and Nitrile Butadiene Rubber gloves.

(iii) The plaintiff has an administrative and finance office at Lot 12.01, Level 12, Menara KWSP, No. 38, Jalan Sultan Ahmad Shah, 10050 Pulau Pinang.

(b) The defendant is a banker carrying on business at various branches throughout Malaysia. The defendant's registered address is at 5th Floor, Bangunan CIMB, Jalan Semantan, Damansara Heights, 50490 Kuala Lumpur.

(i) The defendant was formerly known as Bumiputera-Commerce Bank Berhad.

(c) At all material times, the plaintiff was a customer of the defendant at the following branches and operated the following current accounts:

(i) Until June 2005 at No. 15, Lebuh Pantai, 10760 Penang with Current Account No: 0703-0921499-05-5; and

(ii) Effective from July 2005 at No. 1, Lebuh Pantai, 10300 Penang with Current Account No: 0708-0014588-05-8.

(d) At all material times, the authorised signatories of the plaintiff's current accounts were any one of the following:

(i) Takashi Yamamoto (from 6 February 2002 until 20 June 2008);

(ii) Ichiji Miyano (from 6 February 2002 until 20 June 2010);

(iii) Sadao Tanaka (from 6 February 2002 until 3 May 2010);

(iv) Ryoichi Sato (from 21 June 2008 until 20 February 2009); and

(v) Hironori Tanaka (from 21 February 2009 until 3 May 2010).

(e) Between the period of 14 September 2004 and 1 April 2009, the defendant paid out on 173 cheques amounting to RM33,338,639.27 and debited the plaintiff's account with the amount thereof.

(f) Upon discovery of certain alleged irregularities with the plaintiff's finances, the plaintiff, through its former solicitors, immediately informed the defendant by its solicitor's letter dated 9 April 2009 of the same.

(g) By letter dated 10 August 2010, the plaintiff sent the defendant a demand for an alleged sum of RM33,338,639.27.

Issues

[9] With reference to the respective submissions filed, counsels for both parties were agreed on the four principal issues or areas for determination by this court. I, however, preferred the formulation of issues as set out by the plaintiff's counsel to be more appropriate and I reproduce them:

(a) Whether on a balance of probability, the signatures on the 173 cheques were forged.

A (b) If the cheques were forged, whether the facts gave rise to an estoppel under s. 24 BEA or in law.

(c) If the cheques were forged, whether the defendant-bank was entitled to protection under s. 73A BEA.

B (d) If the cheques were forged, and the defendant-bank failed in its defences of estoppel and s. 73A, then whether the plaintiff is liable to share in the responsibility for the loss pursuant to s. 12 Civil Law Act 1956 (CLA).

Issue 1: Whether On A Balance Of Probability, The Signature On The 173 Cheques
C *Were Forged*

Finding

[10] On the totality of evidence before me, it was my finding that the disputed signatures on the 173 cheques were forgeries of Sadao Tanaka's
D (PW4) signature. Payments released by the defendant on those cheques were in breach of the mandate or authority given by the plaintiff to the defendant in relation to the operations of the plaintiff's current account maintained with the defendant.

[11] There were three sub-issues that arose for consideration under issue 1.
E They were:

(a) On who lay the burden of proof and what was the standard of proof to be applied;

(b) What was the evidence before the court; and

F (c) The effect in law that followed, if the signatures on the impugned cheques were determined to be forged.

[12] There was no doubt that the burden was on the plaintiff as the customer to prove that the signatures on all those disputed cheques were forged or unauthorised (s. 101 Evidence Act 1950 [EA]; *United Asian Bank*
G *Bhd. v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182,).

[13] It was in principle accepted that the fact of the forgery had to be proved on a balance of probabilities only. However counsel for the
H defendant-bank contended that the court should require a higher standard of proof considering that the assertion of forgery was by its very nature a serious allegation.

[14] I was of the view that there was no requirement of a 'higher standard of proof' than the ordinary civil standard of balance of probabilities and what
I the court had to look out for was convincing opinion or a preponderance of evidence from which an inference or conclusion as to the fact of forgery could be drawn.

[15] In so far as evidence was concerned, PW4, the signatory whose signatures were forged denied in court that the disputed signatures on the 173 cheques were signed by him. Although this witness admitted to obvious 'variation' to his signature over time (and also amongst those found on some of the 173 cheques itself), his testimony that the signatures on the 173 cheques were not done by him was firm and convincing, despite intense cross-examination. I found him to be a credible witness.

[16] The court also had before it the opinion of two handwriting experts called by the plaintiff namely PW2 (Iskandar) and PW3 (Lim). PW2 had initially made comparisons only against specimen signatures of PW4 currently obtained and provided but this witness had also subsequently undertaken comparison and analysis of the disputed signatures against contemporaneous specimens available (namely the signature specimen card, current account application form, signature banker form issued when the account was opened and some six cheques issued between 18 July 2007 to 16 March 2009).

[17] PW2 was a chemist attached to *Jabatan Kimia Malaysia* and as such, to me he was an independent witness. His opinion as expressed in his reports was that the disputed signature showed significant differences in handwriting characteristics to the specimens against which it was compared using the recognised 9-point rating scale.

[18] PW3 provided a more detailed analysis using specialised equipment together with photographic support for his conclusion that there were fundamental and significant differences between the 'signature' of PW4 on the 173 disputed cheques and the signature of PW4 available especially on the specimen signature card and other specimen signatures. PW3 had relied on the LAPD-7 scale (Los Angeles Police Department) scale to opine that the disputed signatures were of 'different authorship' from the specimen signatures examined by him.

[19] Both PW2 and PW3 were subjected to grilling questions during cross-examination by counsel for the defendant-bank but they were able to defend their respective opinions very professionally backed by sound reasons or explanations. The fact that they had excluded consideration of certain 'signatures' in their analysis or reporting was explained to be because those signatures were differently formed and were as thus not compatible for effective comparisons.

[20] What was significant to note at this point was that the defendant-bank had a similar opportunity to adduce separate expert opinion to disprove that the challenged signatures were forgeries or to contradict or displace the testimony of PW2 and PW3. The defendant-bank did not avail of the same despite one Madam Lee Gwek Kwee who had been engaged by the defendant-bank for that purpose, had examined the 173 disputed cheques and

A specimen signature that were available for comparisons with PW1 (Inspector Gannason); the court was informed that this was because Lee was not able to reach any conclusive finding which would have been 'of assistance to the court'.

B **[21]** The onus on the plaintiff to prove forgery in this instant case was only in respect of the disputed signatures on the 173 cheques. The focus of the court's enquiry had necessarily therefore to be limited to those disputed signatures. The contention by the defendant-bank that there were other signatures of PW4 on other cheques which were not identical with that provided in the specimen signature card was, in my view, totally irrelevant.

C **[22]** Variation in one's signature over the course of time and from one cheque to another was naturally to be expected as a matter in the ordinary course of human affairs. As a matter of principle it has long be accepted by the courts that no two signatures by the same person would turn out identical each time or over the course of time.

D **[23]** The opinion of PW2 and PW3 were consistent and remained unrebutted. Although I had not done a complete visual comparison of all the 173 signatures on the impugned cheques with PW4's signature available on the specimen signature card or the other specimens provided (which I was E entitled to do under s. 73(1) of EA), I had undertaken some random comparisons myself.

[24] The analysis of PW3 and which formed the contents of the three reports he tendered to court and the further explanation this witness gave to the court (see notes of proceedings of 20 March 2013 and 21 March 2013 F in vol. 1 pp. 194-211) fortified my conclusion that the disputed signatures on the impugned 173 cheques were forgeries and not the signature of Sadao Tanaka (PW4), one of the authorised signatories of the plaintiff, as it purported to be.

[25] What then was the legal effect of this finding of fact by the court? G s. 24 of the BEA provides that the forged signature renders the cheques in question to be wholly inoperative as against the defendant-bank.

Section 24 BEA is reproduced here:

> Forged or unauthorised signature
>
> H 24 Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is I sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.

If a bank pays a cheque bearing a customer's forged signature, the bank had no authority to pay and was not entitled to debit the customer's account (*Syarikat Perkapalan Timor v. United Malayan Banking Corporation Bhd* [1981] 1 LNS 125; [1982] 2 MLJ 193 – the bank did not get a discharge when it made payment on a cheque which bore a customer's forged signature) unless of course the customer, like the plaintiff here, was estopped or precluded from placing reliance on the 'forgery' or want of authority by the customer's own representation, as recognised in equity.

Issue 2: If The Cheques Were Forged, Whether The Facts Gave Rise To An Estoppel Under Section 24 BEA Of In Law

Finding

[26] There was no estoppel that had arisen by clear and direct representation communicated by the plaintiff to the defendant-bank on the facts of this case.

[27] It followed from the finding that all the 173 signatures on the impugned cheques were forgeries (and therefore wholly inoperative), that the defendant-bank had two recourses to exculpate themselves from the claim brought by the plaintiff, namely:

(a) By raising the doctrine of estoppel against plaintiff as provided for in s. 24 BEA; and/or

(b) The statutory defence available to a bank under s. 73A BEA.

[28] It was for the defendant-bank to establish that an estoppel operated against the plaintiff on the facts in this matter. To this end the defendant-bank submitted that:

(a) the plaintiff by its conduct represented to the defendant-bank that the impugned cheques were properly cleared;

(b) the defendant-bank had been influenced by the plaintiff's conduct; and

(c) the defendant-bank had suffered a change of position as a result of the plaintiff's representation.

[29] It was the plaintiff's submission however that in order for an estoppel to arise (to dislodge the effect of s. 24 BEA), there must be a clear and direct representation from the customer to the bank to the effect that the subject cheques were good to be honoured. Such a representation, it was argued, had to emanate directly from the customer or an authorised representative of the customer and ought to be have been communicated expressly to the bank.

[30] The law on this area was fairly settled. As affirmed by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31, the liability of a banker in common law is found on the tort of conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on the customer's account is absolutely liable to

A make good the loss. The forged instrument is a nullity and the banker has no authority, actual or implied from his customer to act on it. Section 24 BEA which codified the common law creates only a limited exception in favour of the banker, where by recourse to the doctrine of estoppel, a customer is precluded from recovering his loss if the customer had
B represented to his banker that the cheque bearing the forged signature was nevertheless effective and good for payment.

[31] It was also fairly settled in law that a customer owed his banker only two duties. The first was to refrain from drawing a cheque in such manner as may facilitate fraud or forgery ('the MacMillan duty'). The second was to
C inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer became aware of it ('the Greenwood duty').

[32] In *Malaysia Plastics Sdn Bhd v. United Overseas Bank (M)* [2012] 4 CLJ 997; [2012] 9 MLJ 336, the issue of what could give rise to an estoppel was ably deliberated by the court. The court held that there must be clear and
D direct representation from the customer to the bank to the effect that the subject cheques were good to be honoured. Nallini J (as she then was) summed up the position in law in the following words:

> This is the key component of an estoppel. Such a representation must emanate directly from the customer and ought to be communicated
E directly to the bank. Conduct from which an inference of authorisation is drawn by the bank without any positive or direct representation from the customer does not appear to have the key characteristic of an estoppel.

[33] The learned judge in *Malaysia Plastics* had earlier in her judgment referred to two cases where estoppel had been ruled in favour of the bank,
F apparently based on conduct of the customer, and distinguished the same on the facts (at para. (61) p. 360). *Brown v. Westminter Bank Ltd* [1964] 2 Lloyds' 187 was a case where the customer had, despite assuring that she would revert, failed to respond to inquiries made by the bank manager directly to her. While in *Tina Motor Pty Ltd v. Australia & New Zealand Banking Group*
G *Ltd* [1977] VR 205, the bank had on two occasions doubted the signatures presented by an employee and the director of the customer had actually given express instructions that the cheques presented by the employee were to be honoured. Such was not the case in this instant matter before me.

[34] The thrust of the defendant-bank's contention that an estoppel had
H arisen in the circumstances of this case was premised purely on 'conduct', more precisely inaction, in that monthly bank statements had been sent to the plaintiff over the period of five years but no protest had been raised by the plaintiff as to any monies being paid out of the account without authority of the plaintiff. The defendant-bank made reference to a term included on
I such monthly statement of accounts that all information and balances shown would be deemed correct unless the bank was informed or notified of any discrepancies within 14 days of the statement date.

[35] It was also the defendant-bank's contention that if proper reconciliation of the cheques issued against those monthly statements had been properly undertaken, the discrepancies would have come to light. Accordingly such failures on the part of the conduct required of the plaintiff influenced or encouraged the defendant-bank to believe that the impugned cheques had been properly cleared and honoured by the defendant and this had led the defendant-bank's position to be altered or changed. For this, the defendant-bank relied on the restatement of the principles of estoppel as found in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad* [1995] 4 CLJ 283; [1995] 3 MLJ 331 FC.

[36] I could not agree with the defendant-bank's submission that estoppel should be held to have inferentially arisen under s. 24 BEA, by merely the plaintiff's conduct in allowing the 173 cheques to be cleared over the five years without detection of the forgery and/or without any protest despite monthly bank statements being issued to the plaintiff. It needs to be emphasised that s. 24 of BEA made the banker who paid out on a forged cheque absolutely liable for losses occasioned to a customer. Given that position in law, any exception, limited as it was, could only arise if there was clear, positive and direct representation from the customer to the bank to override that nullity or total inoperativeness of the forged cheque.

[37] Apart from the *MacMillan* duty and the *Greenwood* duty there was no duty owed by a customer to the bank – a further affirmation of that strict obligation imposed on a banker in a banker-customer relationship. There was no evidence that the plaintiff had even actual or even implied knowledge of the cleverly camouflaged use of the forged cheques until it was discovered on or about 1 April 2009 for any informed assent to be made despite the forgeries. The plaintiff through their solicitors had informed the defendant-bank promptly by letter of 9 April 2009 once the plaintiff had detected 'irregular conduct of staff' amounting to 'criminal matters' and that further investigation were underway.

[38] As noted in Poh Chu Chai, *Banking Law* (2nd edn) at p. 241:

> A customer is not precluded from relying on a forgery of his signature unless he has actual knowledge of the forgery and fails to notify the bank of the forgery. Having the means to find out about the forgery does not raise an estoppel against the customer.

[39] It need also be mentioned that a monthly bank statement does not set out the name of the payee of a cleared cheque. The plaintiff was therefore not in a position to know whether the person to whom a particular cheque had been made out was a party legitimately entitled to that sum paid out. This was in contrast to a monthly credit card statement which invariably sets out the merchant or transaction involved in further detail. A monthly bank statement could also not be equated with the trading transaction statements

issued by a remissier (in respect of shares bought or sold as an agent for the client) which required a notice of objection from the client concerned within a stipulated time, failing which the transaction was deemed as confirmed.

[40] The defendant-bank laid stress on the term to review the monthly bank statement and notify any discrepancies within 14 days of the statement as a condition of the current account. In my view the failure to do so could not reasonably mean that the customer had represented that any misapplication of the customer's funds without proper mandate had been excused or condoned. It was the primary duty of the bank entrusted with custody of the customer's monies not to deal with the same in breach of the express mandate or authorisation.

[41] The defendant-bank's further ground for wanting the estoppel to be operative against the plaintiff, was that the defendant-bank had allegedly obtained 'confirmation' on doubtful high value cheques (exceeding RM25,000) especially after the introduction of the group (information and operations division) branch support procedure (GBS) in May 2007. The evidence before the court (D4 to DW8) was that calls were made to the plaintiff (as a customer) for such confirmation but they would usually be connected to speak to Chen. It was claimed that Chen had authorised or confirmed that the cheque be cleared.

[42] In this case, of particular significance was the fact that there was an express letter for 'authorisation for cheque confirmation' dated the 2 August 2004 issued by the plaintiff to the defendant-bank. The material part of that letter was as follows:

> In the absent [*sic*] of the authorised signature [*sic*], the Bank be and is hereby authorised to request and/or accept confirmation from and/or upon request provide, reveals information to
>
> | Name | I/C NO. |
> |---|---|
> | (1) Ryoichi Sato (Finance Manager) | TZ0204795 |
> | (2) Lim Lay Cheng (Accounts Executive) | A2430496 |
> | (3) Chen Siew Keng (Accounts Executive) | 720721-05-5200 |
>
> Relating to the account, whether the same be overdrawn or not, or relating to the operation of the banking account and transactions of the company.

[43] This authorisation issued for confirmation, expressly required the defendant-bank to first contact any signatory concerned and only in the 'absence' or non-availability of the particular signatory should the defendant-bank contact the other named personnel of the plaintiff for confirmation. Evidence led by the defendant-bank was that only one of such confirmation enquiry was made to PW4 (the signatory), that to in vague term without the witness (DW4, Ghazali) being able to identify as to when and in respect of which cheque this one purported call was made. The defendant-bank's

witnesses on this issue candidly admitted that they referred to or called Ms Chen as they knew she was the person handling matters related to the plaintiff's accounts with the defendant-bank. They were generally not aware of the existence of the aforementioned authorisation letter.

[44] Any confirmation obtained from Chen directly without first contacting PW4 (as has been acknowledged) was definitely unauthorised and absolutely at the defendant-bank's own peril. The defendant-bank cannot gain say that they had been misled to believe that Chen had the authority to confirm doubtful cheque or high value cheque. Furthermore there were also doubts as between defendant-bank's witnesses whether such verification or confirmation was actually done at the centralised outsourced centre or by the branch itself.

[45] In my view, it was immaterial that PW4 and PW5 (Ryoichi Sato) knew that Ms Chen had been in communication with persons at the defendant-bank or had been authorised to collect cheque-books for the plaintiff from the bank. There was no vesting of any supervening authority in Chen to confirm cheques. There was also no evidence that prior to April 2009, PW4 was aware of any 'forgery' of the plaintiff's cheques. Clearly the express authorisation for confirmation of cheques had not been complied with by the defendant-bank.

[46] Accordingly, any such 'confirmation' allegedly made by Chen could not amount to a valid or effective confirmation as there was here in this case non-compliance with the terms of the specific 'letter of authorisation on confirmation' which had expressly directed the step by step process to be undertaken by the defendant-bank in such an exercise to obtain confirmation on cheques. This it must be highlighted was unlike the scenario obtaining in *Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 248 at 25 (Ramly Ali J, as he then was) where such direction in writing was non-existent and the individual in question (from whom confirmation had been sought) had been named in the specimen card as the 'contact' for the customer giving cause for a reasonable inference to be drawn that the individual was the authorised representative of the customer.

Issue 3: If The Cheques Were Forged, Whether The Defendant-Bank Was Entitled To Protection Under s. 73 BEA

Finding

[47] Applying the balance of probabilities standard of proof, the plaintiff, or for that matter PW4 (the signatory), had not knowingly or negligently contributed to the forgeries.

The defendant-bank had failed to satisfy the requirement under the proviso that the defendant-bank had to in any event to act in good faith in making payment on the 173 impugned cheques. Accordingly the defendant-bank was also not entitled to the further defence available under s. 73A BEA.

[48] Section 73A BEA provided for as follows:

> 73A. Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

[49] It is also pertinent to bear in mind that the introduction of s. 73A into the BEA was not intended to absolve a bank of its primary responsibilities and obligations to its customer that was provided for in the other provisions of the BEA. This was evident from the debate and ministerial statement in Parliament on this amendment, a relevant extract of which is set out below:

> Sememangnya diakui akta ibu menekankan kepentingan pengguna. Walau bagaimanapun, pindaan yang telah dicadangkan tidaklah bermaksud untuk mengalihkan risiko pemalsuan tandatangan ke atas pengguna. Bank tetap mempunyai kewajipan dan tanggungjawab yang sepenuhnya untuk memastikan ketulenan tandatangan tuan punya akaun. Dalam hal sesuatu pemalsuan, tandatangan tuan punya akaun adalah menjadi tanggungjawab bank untuk menunjukkan bahawa tuan punya akaun yang secara sengaja atau telah cuai hingga menyebabkan tandatangannya dipalsukan. Dengan perkataan beban pembuktian masih terletak kepada pihak bank.
>
> Pihak bank hendaklah mengukuhkan sistem dan prosedur keselamatan dalam penerimaan dan penunaian cek. Pihak pelanggan pula, hendaklah mengambil peranan yang agak berhati-hati agar tidak cuai atau secara sengaja membiarkan tandatangan dipalsukan.

[50] There were two principal aspects to this statutory defence now open to a bank when faced with a claim for paying out on a forged cheque. They were that the bank had to show that:

(a) the customer knowingly or negligently contributed to the forgery or the making of the unauthorised signature; and

(b) the bank on its own part had acted in good faith when it paid on the said forged cheque.

[51] The plaintiff's counsel argued that a further matter that the court should be mindful of was that on a strict reading of s. 73A BEA, it was the signatory who must be shown to be knowingly and negligently contributing to the forgery and not the customer; in this case PW4 and not the plaintiff as an entity.

[52] There was no dispute that the onus was on the defendant-bank to prove both the aspects and limbs of s. 73A BEA as identified above. I am of the view that the words in that limb, namely, "... that person whose signature it purports to be ..." should not be limited to the immediate signatory or

signatures to the cheque especially where the account holder was a corporate entity. The trend of decisions on this point has been to construe 'knowingly or negligently contribute' widely to include acts knowingly or negligently committed by a 'customer' or the 'drawer' of the cheque which invariably means the account holder and not necessarily limited to the individual signatory or signatures involved. (*Malaysia Plastics Sdn Bhd v. UOB (supra)*; *Prima Nova Sdn Bhd v. Affin Bank Berhad* [2014] 9 CLJ 442 CA; *CIMB Bank Berhad v. Panaron Control Sdn Bhd* [2015] 1 CLJ 1056 CA).

[53] Be that as it may, there was no evidence whatsoever before the court to hold that PW4 (as one of the designated signatories) had personally knowingly or negligently contributed to the forgeries. PW4 was merely a signatory to cheques issued by the plaintiff. He was stationed in Perlis and went to Penang twice a week to sign cheques prepared at the office of IPC Showa. The cheques were drawn up in Penang and PW5 (Ryoichi Sato) was PW4's immediate subordinate there who would present the prepared cheques and clarify any matters before the cheques were signed by PW4. Chen was a subordinate officer under PW5 and there was a structure and system in place at Penang. The cheque-books were kept locked save when it was held by Chen for purposes of preparing cheques. It was not a situation where the financial administration was left without sufficient check and balance entirely or solely with any one individual (as was the scenario we had in *Malaysia Plastics, Panaron Control*).

[54] Turning then to the question whether the plaintiff as the customer/account holder had knowingly or negligently contributed to the forgeries, it must be highlighted that PW5's evidence as to the set-up of the plaintiff Financial Department at Penang and the processes involved before the individual cheques were presented for signing by PW4, was not contradicted at all by the defendant bank. PW5' evidence was that there were other staff at this department, like Ms Lim, Ms. Nicole, Ms Ooi tasked with different responsibilities with respect to plaintiff's accounting and financial matters. It must be reiterated that Chen was not the sole person at the place where the cheques were prepared. In my assessment there was no abdication of responsibility by the plaintiff as both PW4 and PW5 oversaw the accounts of the plaintiff from a management perspective at all times. It would be unreasonable to attribute blame on the plaintiff or its directors merely for having not approached their oversight from a fraud detection angle. Cheque-books were kept in safe place under PW5's control. Chen was tasked only with preparing cheques and it was natural that she would have the relevant cheque book in her custody (in this case, discovered in her drawer); that by itself did not, in my evaluation, constitute a lapse, if at all, to amount to 'knowingly or negligently contributing' to the forgeries.

[55] In my view, there was sufficient evidence that corporate governance of financial matters and the drawing up of cheques at the plaintiff's offices as was in place was spread over different levels and not solely left to one

individual as such. The fact that there had been 173 forged cheques drawn up and cashed out over a span of some five years which had gone undetected did not *ipso facto* or by necessary implication either mean that the plaintiff had knowingly or negligently contributed to the forgeries. There might have been some lapses in scrutiny but the overriding and key factor to be considered was whether PW4 and/or PW5 had reason to suspect that Chen was dishonest and had not taken any remedial action after coming to that knowledge. Both these witnesses were subjected to stringent questioning on this score. However there was no evidence that PW4 or PW5 or any other officers of the plaintiff had any remote hint of the clearly perpetrated criminal designs of Chen.

[56] That brings me to the question whether the bank itself had acted in good faith in clearing those forged cheques in the first place? 'Good faith' has in turn been defined at s. 95 BEA as follows:

> A thing is deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly whether it is done negligently or not.

[57] The defendant-bank's stance was that there ought to be some element of active dishonesty shown on the part of the defendant-bank, that is, in the sense of some fraud or complicity (in this case of the defendant-bank with Chen) to establish breach of the 'good faith' requirement under s. 73A BEA. It was submitted that even reckless disregard or negligence on the part of the defendant-bank in its operation with respect to the clearance of the impugned cheques would not be sufficient to defeat the deemed 'good faith' as provided for in s. 95 of BEA.

[58] The courts in *Malaysia Plastics* and in *Natsafe Engineering Sdn Bhd v. CIMB Bank Bhd* [2014] 4 CLJ 510 have opined that 'good faith' under s. 73A BEA had to have a nexus with the payment out of the cheques itself and it was envisaged that in that factual matrix the bank was expected to act in compliance with the highest standards required of a bank in the discharge of its duties to its customers.

[59] The concept of honesty has been analysed in the Privy Council case of *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378, that is, as to whether the courts should apply the subjective characteristics of honesty test in a particular situation or an objective one, or even a combination of both. However, it is instructive to note that Lord Nicholls in his speech observed further as follows:

> Acting in reckless disregard of other' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee

> of the third party proceedings otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. ....
>
> Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.

[60] In the English Court of Appeal decision in *Starglade Properties Ltd v. Nash,* [2010] All ER (D) 221, it was noted that:

> Ultimately, in civil proceedings, it is for the court to determine what that standard is and to apply it.

This was a reaffirmation of the principle that it was for the courts to objectively determine the standard of 'honesty' required with reference to the specific context, knowledge and qualities surrounding the particular matter.

[61] 'Honesty' was, in my holding, therefore no longer limited to absence of direct impropriety, fraud or complicit conduct but in some situations like here, in the particular context of a banker-customer relationship, acting in reckless or complete disregard of the rights or interest of an account holder or customer to whom a duty was owed by the bank, could fall within the wider meaning of acts not carried out '*bona fides'* or honestly.

[62] The defendant-bank had to prove that it had acted in 'good faith' in clearing the cheques with the forged signatures and acknowledging this the defendant-bank called some 20 witnesses who had verified the impugned cheques at various times and stages. One bank manager was also called.

[63] As it emerged through the testimony of these witnesses for the defendant-bank there was a major gap and lack of clarity as to which 'specimen signature' had been used for the cheque verification exercise that had been undertaken. Evidence led was to the effect that the signature verification process set up by the SPICK Centre for the defendant-bank was as follows:

(a) all cheques would first go through an automated signature verification process (ASV) where the computer would reject cheques with signatures that were significantly different from the specimen signature uploaded onto the system;

(b) all cheques that failed the ASV process would be sent to a VSV-1 SPICK officer for manual verification using cheque images to determine whether the signatures on the cheques are significantly different from the specimen signature.

A (c) for cheques valued below RM25,000 which passed the ASV process, the cheques are deemed to be cleared with no further check by a SPICK officer on the signature.

(d) Cheques valued above RM25,000 which passed the ASV process would be verified a second time by a VSV-2 SPICK officer to
B determine if the signatures on the cheques were significantly different from the specimen signature.

[64] The specimen signature that was used for the above verifications were those that had been uploaded into the system from a 'signature scanner form'. It was pointed out by the plaintiff that the 'signature scanner form' that had
C been produced before the court by the defendant-bank's witness related to the 'Jalan Bukit Lagi, Kangar' branch of the defendant-bank where the plaintiff had a separate account and this was not connected with plaintiff's bank account initially at No. 15, Lebuh Pantai and subsequently at No. 1, Leboh Pantai, Pulau Pinang. This was despite the fact that there was a separate
D 'specimen signature card' provided when the Leboh Pantai Bank account was opened in 2002. The signatures on this speciman signature card were not the signatures that were uploaded on the SPICK Computer System of the defendant-bank and used for the comparisons during the verification process of the plaintiff's cheques.

E **[65]** There was no explanation from the defendant-bank why the Lebuh Pantai Branch would use a scanner form from another branch meant for another account. DW19 (Ruslan), the senior most SPICK Officer amongst SPICK Officers called as witness, conceded this lapse. He could only say that there ought to be a separate signature scanner form at the Lebuh Pantai
F Branch but none was produced. This witness also said that the scanning and uploading into the system of the specimen signatures was done by the scanning department but no one from that department was called to provide any explanation or clarification at all why the Specimen Signature Form uploaded on the SPICK computers used for verification were not the
G signature scanner form that had been submitted for the Lebuh Pantai Branch.

[66] Apart from the above unsatisfactory evidence which went to the root of the issue whether the cheque verification exercise by the defendant-bank or its officers had been carried out in compliance of the plaintiff's mandate, there were also the following matters in evidence which required to be noted:

H (a) The defendant-bank's witness DW19 (Ruslan) confirmed that SPICK did have guidelines/SOPs with regard to the verification process but despite the plaintiff's request, these were not produced. Neither was any evidence produced to support the claim that such guidelines/SOP could
I not be produced because of banking secrecy or that permission had even been sought from Bank Negara Malaysia for limited disclosure of the same.

In the absence of such SOP/guideline the question whether the stipulated processes for cheque clearance had been duly complied with, remained unanswered.

(b) DW3 (Shazrizal) agreed that all the 24 of the impugned cheques he personally verified bore signatures which were significantly different from that of the specimen signature of the PW4 and he only had about two seconds only to verify each cheque.

(c) Most of the SPICK officers had neither seen the SPICK guidelines/SOP nor had they received any proper training on cheque verification and that most of them learnt the job, through 'the buddy system'.

(d) All cheques valued above RM25,000 had to obtain telephone confirmation of the plaintiff (high value confirmation) but this was only done for 85 out of the 173 cheques.

The telephone confirmation, according to the defendant-bank's evidence was done independent of the Branch, by the GBS unit as earlier stated. The records presented showed that all of such telephone confirmation was done with Chen only and this included even one apparently after Chen had resigned from the plaintiff's service.

(e) DW4 (Ghazali) agreed that as per the 'authorisation for confirmation' letter, the telephone call should be first made to the signatory and if there was a hierarchy of names given, it was better to call the more senior persons in that order given if one in the order of precedence was not available.

DW4 claimed initially in evidence he had called PW4 (the signatory) only once but could not provide the date or cheque in respect of which the call was made. Under re-examination he attempted to correct to say that when he called for PW4 he was directed to Chen. Under further cross-examination he conceded that he called PW4 only once. DW4 also testified that he had called Chen on her mobile phone to obtain confirmation.

(f) Other witnesses subsequent to DW4 proceeded to amend their prepared witness statements. Initially it was stated (identically) that they had called the plaintiff's office to speak to Chen but this was amended to read that they called and asked to speak to the 'authorised person'. These witnesses were not aware of the existence of the 'authorisation for confirmation' letter.

(g) The Branch Manager DW1 (Sobri) testified that the branch was not involved in cheque verification and cheque clearance was done by SPICK without reference to the branch.

A (h) There was therefore conflicting evidence as to what was the role of the branch if any, as to confirmation of cheques of value above RM25,000. It appeared that the branch confirmation was a completely different exercise from that performed by GBS.

B **[67]** Could one say objectively then that the defendant-bank had acted in 'good faith' when the proper measures and procedures utilised by the defendant-bank to verify the plaintiff's signatures were not those as one would expect of a prudent banker in the discharge of its contractual obligation to its customer. As has been shown the defendant-bank's principal reliance was on the wrong 'specimen signature' and accordingly the C verifications had been fundamentally flawed right from the first step and continued all the way.

[68] This went to the root of the relationship and the best banking practices to be put in place. It was not merely an issue of the bank acting 'honesty' or 'dishonesty' *per se*. What had been established on evidence here was D clearly that the defendant-bank had acted in reckless disregard of the rights of the plaintiff knowing fully well the seriousness of the transactions involved and the importance of the defendant-bank's role as a banker entrusted with the safekeeping of the plaintiff's monies.

E **[69]** I had found that the plaintiff, or for that matter PW4, had not in any way knowingly or negligently contributed to the forgeries that transpired in this case involving the 173 impugned cheques. On the other hand in this case the defendant-bank on its part had failed to show that the payment made on the cheque had been made in good faith. The defendant-bank was therefore in any event not entitled to the absolute defence under s. 73A of BEA.

F *Issue 4: If The Cheques Were Forged, And The Defendant-Bank Failed In Its Defence Of Estoppel And Under Section 73A BEA, Whether The Plaintiff Was Liable To Share In The Responsibility For The Loss Pursuant To Section 12 CLA*

Finding

G **[70]** It was not open to the court to consider any relief under s. 12 CLA under the head of contributory negligence since the defences under s. 24 BEA and s. 73A available to the defendant-bank were specific and absolute in the context of payments made by a bank on forged cheques.

H Should I be wrong, the appropriate apportionment or extent of contributory negligence of the plaintiff in respect of the losses from the plaintiff's account should be apportioned to be 20% only.

[71] Section 12 of the CLA in so far as is relevant state:

I 12. Apportionment of liability in case of contributory negligence

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the

fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that:

(a) This subsection shall not operate to defeat any defence arising under a contract; and

(b) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) In this section "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from Act, give rise to the defence of contributory negligence.

[72] It was common ground that the plaintiff's cause of action here was based on the tort of conversion. The basic grounds upon which the defendant-bank premised their contention to impose 'contributory negligence' on the plaintiff was that, if not for the deficiencies in the plaintiff's own finance department (as a customer) and/or the failure to have a system of control or financial management to detect forgery or fraud in cheques issued, these losses occasioned to the plaintiff would not have occurred at all and the plaintiff should be held responsible to some extent for the losses.

[73] The submissions of counsel for the plaintiff on this issue could be summarised as follows:

(a) Notwithstanding that the claim here was founded on the tort of conversion, the defences open to the defendant-bank where payments have been made on forged cheques were limited to the common law *MacMillan* and *Greenwood* defences only and/or under s. 24 and s. 73A of the BEA only. The common law defences did not arise in this case. The defence of 'estoppel' and the defence of 'knowingly and negligently contributing to the forgeries' were absolute defences. It followed then that if the defendant-bank failed to succeed on those defences, there was no other relief that was open to the defendant-bank as the forged cheques were 'wholly inoperative' under s. 24 BEA; in no manner could the bank's total liability be avoided or even reduced. In the words of counsel for the plaintiff it was therefore an 'all or nothing' situation in so far as defences under s. 24 and s. 73A was concerned for the defendant-bank.

A (b) The defendant-bank here was a paying bank. It was also contended for the plaintiff that sharing of liability under the principle of contributory negligence has only been applied in cases where collecting banks were being sued. (*Lumsden & Co v. London Trustee & Savings Bank* [1971] 1 Lloyd's Rep 114; *Zanda Investment Ltd v. Bank of America National Trust*
B *& Savings Association & Ors* [1994] 2 HKC 409). Further, under s. 47 of the UK Banking Act, the plea of contributory negligence has been statutorily made available to collecting bank only.

(c) Although *Zanda Investment Ltd* was mentioned by the Court of Appeal in the local case of *Affin Bank Bhd v. Successcom Enterprise Sdn Bhd* [2009]
C 4 CLJ 764, it should be noted that there was no final or conclusive finding on this point as the matter before the court was in respect of an O. 14 RHC 1980 application and the appellate court only agreed there was a triable issue to be determined by the court of first instance.

D (d) It was also pointed out to me that The Report of the Banking Services Law and Practice Review Committee in UK confirmed that there was no liability in law presently for contributory negligence to be adjudged against a paying bank in that jurisdiction. The recommendation of the committee was that relevant law should be introduced, and even then it should ensure that 'contributory negligence' may be raised only if the
E court was satisfied that the degree of negligence shown by the plaintiff was sufficiently serious for it to be inequitable that the bank should be liable for the whole amount of debt or charges.

(e) It was also argued that s. 12(1) CLA ought to be restricted to a recovery of 'damage' situation, where the damage suffered was caused partly by
F one and partly by the other. The situation at hand was 'conversion of monies' in the context of payments that had been made under 'forged cheques' and strictly not 'damage'; the defences under s. 24 and s. 73A BEA were complete (*Malaysia Plastics*) in itself and the court was therefore precluded from extending the defences there provided.

G **[74]** The defendant-bank's counsel's arguments on the other hand were:

(a) Section 12(1) read with s. 12(6) CLA was sufficiently wide for the court to consider and hold that the plaintiff (as the customer in contrast to the signatory) had contributed towards the losses incurred by the plaintiff
H and liability *vis-a-vis* the repayment, if ordered, should be apportioned reflecting the respective parties' responsibility for the loss that had unfolded.

(b) The provisions of s. 12(1) should not therefore be confined to 'collecting bank' only.

I (c) If it had been the intention of the legislature to exclude the application of s. 12 CLA to a banker-customer situation, then this would have been expressly laid down when s. 73A BEA was introduced as an

amendment. The principle accepted and applied in construing statutory provisions, namely, that the specific overrides the general would only arise if there was a conflict as between the provisions found in different statutes. There was no apparent inconsistency between those provisions here and s. 12 of CLA could exist side by side and have equal validity and force with the provision of the BEA.

[75] There was no quarrel as between counsel for both parties that the principle of 'contributory negligence' would apply where the liability arose in a mixed contract and tort context (*F Vesta v. Butcher & Ors* [1986] 2 All ER 488) counsel for the defendant-bank also had no issue with the position in law that the defence open to the bank under s. 73A was an absolute defence, as have been accepted by many decided authorities on the point.

[76] I was also referred by counsel for the plaintiff to the Australian position on this issue. In the New South Wales Supreme Court case of *Wilton v. Commonwealth Trading Bank of Australia* [1973] 2 NSWLR 644, the court had ruled that the defence of contributory negligence was not available in an action for conversion involving misappropriation of monies on a cheque by a third person. The Supreme Court of South Australia in *Day v. Bank of New South Wales* 19 ALR 32 and the Supreme Court of Victoria in *Australian Guarantee Corporation Ltd v. Commissioner of the State Bank of Victoria* [1989] VR 61 followed the position taken in *Wilton* case. *Day* involved a case for misappropriation of fund brought against collection bank while the *Australia Guarantee Corporation* case was where the cheque had been obtained by 'fraud'. In both these cases the further defence of contributory negligence was raised but rejected by the courts. Ormiston J in the *Australian Guarantee Corporation* case after considering relevant cases (including *Lumsden* and the New Zealand Court of Appeal case of *Helson v. McKenzies (Cuba Street) Ltd* [1950] NZLR 878) and topical articles and textbook commentaries opined that in the context of the Bills of Exchange Act (there) if any alteration was to be made to extend the defence of contributory negligence to the tort of conversion, they were best to be made by Parliament.

[77] Having given careful thought to this somewhat challenging issue, I was of the view that if the defendant-bank failed to succeed on the defence raised by them pursuant to s. 73A BEA, the position with respect to the forged cheques reverted to the position in law as stipulated in s. 24 BEA, namely that the defendant-bank was imposed with strict liability to pay fully to the customer the monies wrongly paid out on the forged cheques.

[78] Section 73A read together with s. 24 BEA did not provide room for any reasonable construction otherwise, namely, that the sharing of responsibility for the losses was a further factor to be taken into consideration and liability be accordingly apportioned between the plaintiff and the defendant-bank when ordering a repayment of the sum converted. In other words there was no question of sharing of responsibility to be adjudged by the court in the light of the strict liability provisions found in the BEA.

[79] Section 73A was an absolute and complete defence statutorily open to a banker. The debate whether s. 73A was a codification of existing common law defences or a new defence will go on. However what was clear from that statutory provision was that, provided the bank had shown that it had in processing such forged cheques acted in good faith towards its customer, and the bank was able to establish that the customer or signatory had knowingly or negligently contributed to the 'forgery', only then could the bank avail of a plea to be exculpated from total (as opposed to any partial) liability to the customer.

[80] It had to be borne in mind too that what we were dealing with was the recourses and defences available in context of a transaction of a negotiable instruments, here a forged cheque. Such recourses and defences were specific to that situation as recognised and set out specifically in the BEA; the significance of reliance on a negotiable instrument and attendant implications in law arising from it being not properly honoured or dishonoured, could not be over stated.

[81] Accordingly, the fallout from any mishandling of such cheques in so far as the banker or the customer was concerned had to be determined within the confines of the provisions of BEA itself. There was no valid basis for further consideration of even partly exculpating the bank, as would be the effect of what was being canvassed here by the defendant-bank. The bank's total liability stood or fell depending on the outcome of their defence, if any, advanced under s. 73A.

[82] Any consideration of s. 12 CLA was accordingly a non-issue in that particular circumstances where the defence available to a bank arising from transacting on a forged cheque was statutorily limited to what was provided in s. 73A BEA. I was inclined to accept the position taken by the Australian courts on this issue as instructive, namely that, irrespective of whether it was a collecting bank or paying bank situation, there should be appropriate legislative intervention first, before the courts decide to support or extend the concept of apportionment of liability under the head of 'contributory negligence' into the enforcement of the strict provisions of the BEA. In UK, as was noted earlier, there was such specific legislation introduced for such an extension, *albeit*, only limited to cases involving collecting banks.

[83] However, should I be held to be wrong on my aforesaid conclusion, I was required as the trier of facts in this case, to state what would in my assessment, be a fair and reasonable apportionment of liability, if indeed recourse or relief was further available to the defendant-bank under s. 12 CLA.

[84] The 'fault' or 'lapse' on the part of the plaintiff, in my view, which might attract some element of blame to be attributed to the plaintiff too, would perhaps be the long lapse of five years and the large number of forged cheques (173) that had passed through the banking process or operations,

before the fraud perpetrated was detected by the plaintiff. The reasonable extent of liability that should be imposed in those circumstances on the plaintiff, if at all, in my view, should be limited to 20% and accordingly the defendant-bank should still be held liable to pay 80% of the total sum adjudged payable to the plaintiff in this suit.

I have already ruled earlier that the PW4, or for the matter the plaintiff as the customer, did not negligently contribute to the forgeries. As such that factor should be excluded and not feature at all in any apportionment, if at all, of responsibility for the losses suffered by the plaintiff.

[85] Finally, it need also be stated here that from all material before the court, the reasonable inference to be drawn was that Chen was the individual acting on her own who caused the 'forgeries' of PW4's signature on all of the 173 forged cheques. Her counsel participated in the trial (and even cross-examined some witnesses) but did not make any closing submission to dispel any such inference being drawn from the matters in evidence and the overall surrounding circumstances. In this regard it was significant that Chen had also abruptly resigned from the services of the plaintiff (or IPC Showa) upon discovery of the first six forged cheques on or about 1 April 2009.